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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LOCAL UNION 1011, UNITED STEELWORKERS OF AMERICA. AFL-CIO-CLC,

Petitioner,

v.

ALEXIS HERMAN, Secretary of Labor,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LEON DAYAN
LAURENCE GOLD
(Counsel of Record)
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

CARL B. FRANKEL
General Counsel
UNITED STEELWORKERS OF AMERICA
5 Gateway Center
Pittsburgh, Pennsylvania 15222

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Local 3489 Steelworkers v. Usery*, 429 U.S. 305 (1977), union "meeting attendance" candidacy eligibility rules—rules requiring prospective candidates to attend a stated number of union meetings—are to be judged

   (a) by a single-factor "impact" standard, as the D.C. Circuit holds;

   (b) by the Secretary of Labor's historic multi-factor 29 C.F.R. 452.38(a) standard, as the First Circuit holds; or

   (c) by a multi-factor "onus of justification" standard, as the Seventh Circuit holds?

2. Whether judged by the correct legal standard, the current United Steelworkers of America meeting attendance rule—as amended by the Union in 1978 in the wake of this Court's *Local 3489* decision, and as approved by the Secretary of Labor as a reasonable rule at that time—is a rule that is a "reasonable [candidacy] qualification" within the meaning of § 401(e) of the Labor-Management Reporting and Disclosure Act of 1959?

PARTIES

All parties are listed in the caption of the case.

There are no parent companies or nonwholly owned subsidiaries involved.

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PETITION FOR A WRIT OF CERTIORARI

Local 1011, United Steelworkers of America prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in *Herman v. Local Union 1011, United Steelworkers of America*, 7th Cir. No. 99-3146.

OPINIONS BELOW

The opinion of the court of appeals is reported at 207 F.3d 924 and is reproduced in the appendix to this petition at App. 1a-8a. The opinion of the district court—the United States District Court for the Northern District of Indiana—is reported at 59 F.Supp.2d 770 and is reproduced at App. 9a-35a.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2000. On June 12, 2000, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including July 21, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 401(e) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), provides in relevant part as follows:

> In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed).... The election shall be conducted in accordance with the

constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

STATEMENT

This action by the Secretary of Labor under § 401(e) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), seeks to set aside the Local 1011, United Steelworkers of America ("Local 1011") election of officers on the ground that a candidacy eligibility rule under which the election was conducted—the "meeting attendance" rule—is an unreasonable rule within the meaning of LMRDA § 401(e). The meeting attendance rule—made binding on the approximately 2,000 Steelworker local unions by the United Steelworkers of America ("USWA") Constitution—provides that a member who wishes to be a candidate for and hold local union office must, in the two-year period preceding the election, attend at least one-third of the monthly membership meetings that the member was not prevented from attending due to conflicting work hours, conflicting union business, illness, a death in the family, jury duty, or military service.

This case, particularly as it reaches this Court, is as much the product of the Secretary of Labor's administration of LMRDA § 401(e)—both overall and with particular regard to union meeting attendance candidacy eligibility rules—and of the train of LMRDA § 401(e) meeting attendance rule litigation both before and after this Court's pivotal decision in *Local 3489 Steelworkers v. Usery*, 429 U.S. 305 (1977), as it is about the particular USWA meeting attendance rule and its application to the Local 1011 election of officers at issue. We therefore state the case by outlining its administrative and litigation background and by then setting out the particulars here.

1. From the LMRDA's enactment, the Secretary has promulgated regulatory guidelines for distinguishing meeting attendance rules that are "reasonable" under LMRDA § 401(e) from those that are "unreasonable." At the time of this Court's *Local 3489 Steelworkers* decision, the pertinent § 401(e) interpretive regulation was codified at 29 C.F.R. 452.38(a) (1977). The regulation stated (then as now) that meeting attendance rules can serve legitimate union interests in "insur[ing] that candidates have a demonstrated interest in and familiarity with the affairs of the organization," and went on to provide:

> [T]he reasonableness [of a meeting attendance requirement] must be gauged in the light of all the circumstances of the particular case, including not only the frequency of meetings, the number of meetings which must be attended, and the period of time over which the requirement extends, but also such factors as the nature, availability and extent of excuse provisions, whether all or most members have the opportunity to attend meetings, and the impact of the rule, *i.e.*, the number or percentage of members who would be rendered ineligible by its application. [29 C.F.R. 452.38(a) (1977)].

2. The foregoing regulation accurately memorializes the Secretary of Labor's position that the "percentage-rendered-ineligible factor" is not controlling—a position the Secretary adopted in the early days of the statute and maintained in the period following this Court's decision in *Local 3489 Steelworkers*.

Prior to *Local 3489*, for example, the Secretary stated in a 1966 position letter that "[i]t would be less than fair to attack a meeting attendance requirement simply because of the failure of union members to actually attend meetings (thus leading to their disqualification for office)," inasmuch as that

approach to measuring reasonableness "tend[s] to unduly penalize the legitimate interest of a union in encouraging participation in the affairs of the union."

And, in the period following the *Local 3489* decision, the Department of Labor—under the administration of a number of different Secretaries and in cases involving both the Steelworkers and other unions—declined union member petitions to bring suit to set aside elections conducted under union meeting attendance requirements that a high proportion of the union's members had failed to satisfy. In each instance, the Secretary provided the union member with a written "Statement of Reasons" explaining why, under the factors set forth in the regulations, the Secretary had declined to bring suit.

To take one example from several cited to the courts below, in a 1978 Statement of Reasons for declining to bring suit involving an Electrical Workers election run under a rule requiring attendance at one-half of the twelve monthly meetings preceding the election, and where 97% of the union's members did not attend the requisite number of meetings, the Secretary stated, first, that "neither the number of meetings required nor the period of time involved imposes an unreasonable restriction on a member's right to seek union office"; and, second, that "[i]t is the position of the Department of Labor that if a meeting attendance rule is otherwise reasonable, the rule will not be held unreasonable on the basis of its impact on membership eligibility alone."

3. In the *Local 3489 Steelworkers* case itself, the Secretary invoked the 29 C.F.R. 452.38(a) multi-factor standard to challenge the Steelworker meeting attendance rule in force at that time, which required a member to attend *one-half* the monthly meetings over a *three-year* period and which, in the particular election at issue, had the effect of rendering ineligible for office the 96.5% of the union's members who

did not attend the requisite number of meetings. As explained in more detail below, this Court upheld the Secretary's position that the Steelworker one-half-of-meetings/three-year rule was unreasonable. *Infra* at pp. 13-14.

4. In the wake of the *Local 3489* decision, the delegates at the USWA's 1978 biennial convention amended the USWA Constitution to adopt the current meeting attendance rule requiring attendance at *one-third* of the monthly meetings over a *two-year* period. And, "in 1978, just after the *Steelworkers* decision, the Department of Labor [first] reviewed the current USWA attendance rule under its interpretive regulations [and then] provided an official statement to the USWA indicating that its rule 'would be regarded as reasonable within the guidelines even if ... [a] high proportion of the membership'" did not attend the required number of meetings. App. 17a (quoting Department of Labor Statement at 1); *see also* 1978 Department of Labor Statement at 2 ("The rule discussed above (one-third of the meetings in the 24 months preceding the election) would, in our judgment be reasonable as to the number of meetings required to be attended and would not be subject to challenge because of the percentage of the membership which failed to qualify"). The Secretary stated as well that an essential condition of her approval of the amended meeting attendance rule was that the rule contain a liberalized excuse provision which recognized four valid excuses for non-attendance at meetings ("death in the family, illness or other incapacity, jury duty, military service") in addition to the two reasons that previously had been recognized (conflicting work hours and conflicting union business). 1978 Department of Labor Statement at 1-2.

5. The Secretary's longstanding multi-factor standard for determining the validity of meeting attendance rules was then frontally attacked in *Doyle v. Brock*, 821 F.2d 778 (D.C. Cir.

1987). In a 2-1, decision, the D.C. Circuit held that a showing that 97% of the membership had not attended the required six monthly meetings in the year prior to a union election made out a *per se* violation of LMRDA § 401(e), and that it was an abuse of discretion for the Secretary to decline to bring suit to set aside the election, regardless of whether the six-meeting/one-year rule imposed any significant burden on candidacies and regardless of whether any or all of the other factors in the 29 C.F.R. 452.38(a) regulations weighed in favor of the rule's reasonableness. The *Doyle* majority based its holding on its reading of this Court's decision in *Local 3489 Steelworkers*—a reading that Judge Silberman, dissenting, disputed. *Compare* 821 F.2d at 785 (majority opinion) *with id.* at 787 (Silberman, J. dissenting). *See also infra* at pp. 14-15 (further discussing *Doyle*).

The Secretary thereafter announced that "the Department under *Doyle* will take enforcement action whenever a meeting attendance requirement disqualifies a large portion of a union's membership from candidacy," 60 Fed. Reg. 26391 (May 17, 1995), and provided a single reason for her new enforcement policy:

> Since *Doyle* was decided in the District of Columbia Circuit, where the Secretary is located, and since ... any member may bring litigation against the Secretary for judicial review of his decision not to take enforcement action, a decision by the Secretary not to follow *Doyle* in another circuit would be susceptible to successful legal challenge in the D.C. Circuit. [*Id.*]

Concurrent with this statement, the Secretary formally amended her meeting-attendance-rule interpretive regulation —29 C.F.R. 452.38(a)—by making one footnote change to the regulation stating as follows:

> If a meeting attendance requirement disqualifies a large portion of members from candidacy, that large

> antidemocratic effect alone may be sufficient to render the requirement unreasonable. In *Doyle v. Brock*, 821 F.2d 778 (D.C. Circuit 1987), the court held that the impact of a meeting attendance requirement which disqualified 97% of the union's membership from candidacy was by itself sufficient to make the requirement unreasonable notwithstanding any of the other factors set forth in 29 C.F.R. 452.38(a) [29 C.F.R. § 452.38(a) n.25].

5. The instant lawsuit was brought under the new enforcement policy reflected in the footnote just quoted. The election that gave rise to the lawsuit was held by Local 1011 in April 1997. App. 10a. In the two-year period preceding the election, the Local held duly noticed monthly Thursday 5:30 p.m. membership meetings at a union hall located less than two miles from the East Chicago, Indiana LTV steel plant where the Local's members worked.[1]

In the months leading up to the election, the "Steelworkers Caucus" and the "Concerned Members Caucus" formed two separate slates of eleven candidates to compete for the eleven local union offices at stake. The Concerned Members Caucus was headed by the incumbent President, Dennis Henry, who had gained his position by challenging and defeating the previous incumbent in 1994 when Henry was a rank-and-file

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[1] In the USWA, monthly membership meetings play a central role in the governance of local unions. As set out in the USWA Bylaws for Local Unions, which were part of the summary judgment record, USWA local unions are governed through a form of direct democracy according to which the approval of the majority of members in attendance at a local union meeting is required before local union officers may take any action that would require the expenditure of local union funds, and before the officers may take other significant actions. *See* USWA Bylaws, Art. V, § 5(c).

member. At the nomination meeting conducted by the Local one month prior to the 1997 election, all twenty-two individuals on the two competing slates were nominated for the eleven offices, as was one other individual not affiliated with either slate. All twenty-three nominees had attended a sufficient number of meetings to satisfy the above-described "meeting attendance rule"; none were disqualified by the rule; thirteen of the twenty-three were non-incumbents. App. 11a. Previous Local 1011 nomination meetings had produced similar results: At least two candidates eligible under the meeting attendance rule qualified for and appeared on the ballot for each one of the eleven officer positions in each Local 1011 election since 1982—which is far back as Local 1011's records go.

In the 1997 election at issue here, then, none of the 23 nominees were ineligible under the meeting attendance rule (nor were any members identified who would have sought a nomination but for the rule). At the same time, the large majority of Local 1011 members did not attend a sufficient number of meetings to satisfy the rule. The parties stipulated that approximately 242 of the Local's 2990 members (8%) satisfied the requirements of the rule and that the remainder (92%) did not. App. 11a.

6. In her summary judgment submission to the district court, the Secretary of Labor rested her challenge to the USWA meeting attendance rule as it applied to Local 1011's 1997 election on a single ground: that, under the *per se* "percentage ineligible" standard announced by the D.C. Circuit in *Doyle* and incorporated by the Secretary into her regulations in 1995, the USWA rule was unreasonable because a high percentage of the Local's members failed to attend a sufficient number of meetings to qualify as a candidate under the rule. As the district court noted, "the Secretary made it clear in her reply [to Local 1011's motion

for summary judgment] that her case 'is predicated entirely on the fact that, even with a liberal excuse provision, 92 percent of the members of Local 1011 were barred from running for office.'" App. 18a.

Local 1011, in response, argued that *Doyle* is unsound, and that—as the Secretary herself had found in her 1978 position letter—the USWA rule is a reasonable rule when assessed under the Secretary's pre-*Doyle* multi-factor reasonableness standard.[2]

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[2] As part of its summary judgment submission in support of the reasonableness of the USWA rule, Local 1011 submitted without objection the expert declaration of University of Texas professor and former Labor Secretary Ray Marshall, which states, in its essence:

- First, that the USWA meeting attendance rule, by inducing members who are considering challenging the incumbent officers to attend local union meetings, serves the substantial union interest in making the meetings themselves more democratic. "[O]nce [potential opposition candidates] are present at the meetings, they are apt to voice their opinions, and there is therefore a chance that their views will lead members to reject, modify, or approve after deliberation officer recommendations that otherwise might be rubber-stamped." Thus, "[i]t is more important ... that attendance at union meetings [include] ... persons who are apt to dissent from the incumbent administration's program" than "that attendance be high in absolute terms."

- Second, that the USWA meeting attendance rule is well-suited to serving the union interest in attracting potential opposition candidates to the meetings, because the rule requires attendance at a number of meetings that is high enough to induce attendance at a significant number of meetings, but that is not so high as to require members to make up their mind about a potential candidacy at a time that is too early in the election cycle for potential candidates to have begun contemplating a candidacy.

In its July 21, 1999 opinion, the district court granted the Secretary of Labor's motion for summary judgment and denied the Local's cross-motion.

7. The Seventh Circuit, in an opinion by Chief Judge Posner, affirmed. The court of appeals, like the district court, rejected the D.C. Circuit's view in *Doyle* that this Court's *Local 3489 Steelworkers* decision requires the invalidation of a meeting attendance rule any time that a high percentage of members do not choose to satisfy it. App. 5a-6a, 26a. The court of appeals also declined to defer to the Secretary's footnote regulation incorporating *Doyle*. App. 5a.

After rejecting *Doyle*, the court of appeals, rather than applying the reasonableness standard developed and applied by the Secretary of Labor when she was unencumbered by *Doyle* and by her *Doyle* footnote, fashioned its own novel three-factor "onus of justification" standard for determining the validity of meeting attendance rules. App. 7a.

First, to show that its attendance requirement serves an important union interest, a union must, under the Seventh Circuit's test, show that its attendance requirement is so unbending that even a member who is legitimately excused from attending every meeting and who therefore is "without fault in failing to satisfy" the requirement, is denied the right

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- And third, that the excuse provisions contained in the Steelworkers' constitution, which are limited to excuses that are beyond the practical control of the member, do not undermine the purposes of the underlying attendance rule, "because attendance, by hypothesis, cannot be induced from members whose conflicting demands make meeting attendance a practical impossibility," and "because a union member who cannot attend a meeting for reasons beyond his or her control is not demonstrating any lack of commitment to union affairs by missing a meeting."

to run for office. App. 4a. Second, a union must show that its rule requires attendance at the fewest possible meetings to serve its institutional interest, *viz.* that there is no less restrictive "alternative inducement[]" to encourage attendance at meetings. App. 7a. And, third a union must prove that its meetings are run in accordance with various procedures of the Seventh Circuit's devising, including, *e.g.*, the "distribut[ion]" to all members in advance of the meeting of an "agenda or other [similar] material." App. 3a.

The court of appeals then applied its newly minted "onus of justification" factors to this case and held that those factors were not satisfied here. App. 3a, 4a, & 7a.

REASONS FOR GRANTING THE WRIT

In *Local 3489, Steelworkers v. Usery*, 429 U.S. 305 (1977), this Court granted *certiorari* to consider the most important, most litigated, and most contentious question raised by Labor-Management Reporting and Disclosure Act § 401(e)—the proper application of that provision, which regulates union candidacy eligibility rules, to the eligibility rule, widespread in the labor movement, requiring attendance at a stated number of union meetings.

In the wake of the *Local 3489* decision, that question continues to be the most important, most litigated, and most contentious LMRDA § 401(e) question. The *Local 3489* decision, rather than settling the meaning of LMRDA § 401(e) and its application to union meeting attendance rules, has instead generated a new round of legal controversy as vigorous as the first.

This time it is a controversy over the proper reading of the *Local 3489* decision. And, first the D.C. Circuit, then the First Circuit, and now the Seventh Circuit, have read this Court's *Local 3489* decision in three different and irreconcilable ways.

By reason of that conflict, every union election run under a meeting attendance rule is in jeopardy to a court challenge by the Secretary of Labor on a *post hoc* evaluation of the rule's "impact," and the validity of each such election is subject to a different outcome-determinative legal test depending on the circuit in which the Secretary brings suit.

This LMRDA § 401(e) legal controversy cannot be settled by the Secretary of Labor's—or by a Court of Appeal's—reading of the *Local 3489* decision and its lessons; the disagreements in that regard make that plain. Only this Court's gloss on its own prior *Local 3489* decision can do so. This petition therefore returns the LMRDA § 401(e) meeting attendance rule question to this Court for its further consideration and for its authoritative resolution.

1. LMRDA § 401(e) provides that "a reasonable opportunity shall be given for the nomination of candidates [to union office] and every member in good standing shall be eligible to be a candidate and hold office (subject to . . . *reasonable qualifications* uniformly imposed)." (Emphasis added). Thus, § 401(e) does not create an absolute public law right to be a candidate, but seeks instead to accommodate the interest of union members in becoming candidates with the interest of unions as private voluntary associations in establishing rules to govern their own affairs. That balanced accommodation between individual union member rights and institutional union rights runs throughout the LMRDA. *See generally Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1981); *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 470-71 (1968) (In enacting the LMRDA, "Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs.").

Nowhere are these rights more important—or the striking of the proper balance more sensitive—than with regard to candidacy eligibility rules. Recognizing that the LMRDA § 401(e) "reasonableness" standard is central to the administration of the Act, the Secretary of Labor at an early point exercised her institutional expertise to establish regulatory guidelines that serve to distinguish reasonable from unreasonable eligibility rules in general, and for distinguishing reasonable from unreasonable meeting attendance eligibility rules in particular. *See* 29 C.F.R. 452.36 (standards governing eligibility rules generally); *id.* 452.38 (standards governing meeting attendance rules). The Secretary treated with meeting attendance eligibility rules as a separate category out of the recognition that "many unions had such requirements at the time the LMRDA was enacted." 60 Fed. Reg. 26391 (May 17, 1995).

2. In *Steelworkers Local 3489*, the Secretary of Labor, invoking her multi-factor 29 C.F.R. 452.38(a) "reasonable meeting attendance rule" regulation (quoted *supra* at p. 3), brought suit to set aside an election conducted under a predecessor Steelworker rule which required attendance at *one-half* of the monthly meetings in a *three-year* period and which 96.5% of the local union's members had not satisfied.

As the *Local 3489* Court noted, the Secretary there made a two-pronged argument: that "the failure of 96.5% of the local members to satisfy the meeting-attendance requirement," taken together with "the rule's effect of requiring potential insurgent candidates to plan their candidacies as early as 18 months in advance of the election when the reasons for their opposition might not have yet emerged," established "that the requirement has a substantial antidemocratic effect on local union elections." 429 U.S. at 308.

This Court upheld the Secretary's position, relying first on the high percentage of members that failed to qualify, 429

U.S. at 310 (noting that a requirement that results in the disqualification of 96.5% of the members "hardly seems to be a 'reasonable' qualification"), and then on the rule's adverse effect on potential insurgent candidates, *id.* at 312 ("very few members ... are likely to see themselves as such sufficiently far in advance of the election to be spurred to attendance" by a rule requiring attendance to begin 18 months before the election). In so doing, the Court rejected the union's argument that the absence of more specific guidance from the Secretary on the interplay of the various factors bearing on reasonableness set out in 29 C.F.R. 452.38(a) left unions without sufficient direction in drafting and maintaining valid meeting attendance rules. *Id.* at 313. In this latter regard, the Court, after quoting the text of the Secretary's 29 C.F.R. § 452.38(a) regulation, stated that such a "flexible" standard is what Congress "clearly contemplated." *Id.*

3. There is now a three-way disagreement among the Courts of Appeals over the meaning of the *Local 3489 Steelworkers* decision and over the LMRDA § 401(e) standard by which to determine the reasonableness of meeting attendance rules.

(a) In *Doyle v. Brock*, *supra*, the D.C. Circuit overturned the Secretary's determination *not* to bring suit to set aside an election where the meeting attendance rule in question required attendance at six meetings in the twelve months preceding the election and where 97% of the members had failed to satisfy that requirement.

In response to the Secretary's submission that six months before an election, potential campaign issues typically *will* have emerged and that potential candidates *will* be spurred to attendance by a meeting attendance rule, the D.C. Circuit concluded that *Local 3489* made the percentage-disqualified factor dispositive in meeting attendance rule cases. 821 F.2d at 785.

The *Doyle* majority reached that conclusion by reading *Local 3489 Steelworkers* as standing for the proposition that, "although ... attendance requirements are to be subjected to case-by-case analysis, the analysis is limited to determining only if 'the anti-democratic *effects* of the meeting-attendance rule outweigh the *interests* urged in its support.'" 821 F.2d at 785 (quoting *Local 3489 Steelworkers*, 429 U.S. at 31) (emphasis in *Doyle*). And, according to the *Doyle* majority, the interests urged by the Secretary in support of meeting attendance rules had already been rejected by this Court as insufficient to justify any rule that has the effect of rendering a high percentage of the union's members ineligible. 821 F.2d at 785.

Judge Silberman, dissenting, stated that "[t]he difficulty with the majority opinion ... is that the [Supreme] Court in *Steelworkers* assiduously avoided the holding that my colleagues ascribe to it.... Indeed, the Court in approving the Secretary's case-by-case approach to attendance requirements noted that the policy—which remains unchanged—weighed, *inter alia*, the period of time over which the requirement extends." 821 F.2d at 787. Judge Silberman added:

> [T]he majority does more than simply fail to give deference to the Secretary. It also eviscerates the "reasonableness" standard of § 401(e). The logic of the majority's opinion would require the Secretary to sue to overturn an election if a union attendance requirement, no matter how innocuous, turned out in hindsight to disqualify some percentage (presumably in excess of 90%) of the membership." [*Id.*]

Thereafter, as we have noted (*supra* at pp. 6-7), the Secretary announced that "the Department under *Doyle* will take enforcement action whenever a meeting attendance requirement disqualifies a large portion of a union's membership from candidacy," stating as her sole reason for so doing that "any member may bring litigation against the

Secretary" in the D.C. Circuit, and that "a decision by the Secretary not to follow *Doyle*" therefore would always "be susceptible to successful legal challenge in the D.C. Circuit." 60 Fed. Reg. 26391.

(b) In the first case to adjudicate an election challenge brought by the Secretary under her *Doyle* enforcement policy, *Herman v. Springfield Massachusetts Area Local 497, Postal Workers*, 201 F.3d 1 (2000) ("*Postal Workers*"), the First Circuit rejected *Doyle*'s reading of *Local 3489 Steelworkers*, embraced Judge Silberman's, and upheld a meeting attendance rule which required attendance at one-third of the meetings in the twelve-month period before the election — a rule that over 96% of the union's members had not satisfied. In particular, the First Circuit reasoned that "if *Steelworkers* is taken to impose a rigid, one-factor test based on percentage, much of the opinion becomes surplusage, particularly the section in which the Court approved the Secretary's own flexible multi-factor test for reasonableness." 201 F.3d at 5.

Having rejected the proposition that the percentage test is controlling, the First Circuit went on to hold that it "shared" the Secretary's pre-*Doyle* view of the *Local 3489, Steelworkers* decision, 201 F.3d at 5, according to which the several factors stated in 29 C.F.R. 452.38(a)—and not just the "impact" factor—were to be consulted in judging the reasonableness of a meeting attendance rule that a high proportion of a union's members do not satisfy. Since the Secretary did not contend that the rule was unreasonable under those factors, and since the Postal Workers' rule—in requiring attendance to begin four months before the election and in allowing credit for excused non-attendance due to conflicting work hours and other compelling reasons—was not burdensome or otherwise unreasonable under those factors, the First Circuit upheld the rule. 201 F.3d at 3.

(c) The Seventh Circuit in this case took yet a third approach: The court below, like the First Circuit, disagreed with *Doyle*'s reading of *Local 3489 Steelworkers* and rejected as well the Secretary's reliance on the footnote in her regulation incorporating *Doyle*. App. 5a ("We agree with the union that the footnote is entitled to little weight... I[t] is inconsistent with the body of the regulation, which makes no factor controlling; and the only reason the Department gave for it ... is the perceived futility of bucking a decision by the District of Columbia Circuit that appeared to have adopted the per se approach, *Doyle v. Brock*, *supra*. And it is wrong.").

But, in contrast with the First Circuit, the Seventh Circuit, after rejecting the footnote, did not return to the regulation and the enforcement policy the Secretary had adopted when unencumbered by *Doyle*; rather, the court below, without explaining its departure from the Secretary's pre-*Doyle* approach, read *Local 3489* as permitting the imposition of a newly-devised "onus of justification" on the union, requiring the union to establish that its rule is valid under three "reasonableness" factors established by that court. App. 7a.[3] The Seventh Circuit's approach is entirely novel. None of

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[3] As we have noted in the statement, the Seventh Circuit's first "reasonableness" criterion is that a meeting attendance rule must be so inflexible in demanding attendance as to make even "the fact that a member was without fault in failing to satisfy it" insufficient to "excuse the failure." App. 4a. Its second "reasonableness" criterion is that the union must show that its rule requires attendance at the fewest possible meetings necessary to serve its institutional interests, *viz.*, that there is no less restrictive alternative eligibility rule. App. 7a. And, its third "reasonableness" criterion is that the union must show that its meetings are conducted according to various procedures of that court's devising, such as mailing of agendas in advance of each meeting to all members. App. 3a.

that court's "reasonableness" criteria had been consulted, much less deemed dispositive, by the Secretary, by the First Circuit, or by any other court.

4. The D.C. Circuit's *Doyle* decision, the Secretary's *Doyle*-compelled enforcement policy, the First Circuit's *Postal Workers* decision, and the Seventh Circuit's decision here create an arbitrary, irrational LMRDA § 401(e) regime that cannot be justified by the interest in protecting the right to be a candidate and that entirely overrides the interest in union self-government—particularly where the union is national in scope and has provided in its constitution for a uniform meeting attendance rule applicable in all local unions throughout the country.

Under this regime, the Secretary will bring suit to overturn any election run under a meeting attendance rule that does not pass a pure *post hoc* "impact" test. Very simply stated, that test makes no sense on its own terms. As the First Circuit explained in *Postal Workers*, "looking at 'impact' solely from the nomination day perspective is misleading. Since most union members do not intend to run for office in a given election, most are not going to trouble to meet *any* precondition that requires them to do anything different from what they ordinarily do—no matter how slight the burden or how reasonable a condition for those who do wish to be candidates." 201 F.3d at 4 (emphasis in original).

The Secretary's statement of her enforcement policy offers no justification on the merits for that policy, much less a justification that counters that salient point made by the First Circuit. What that statement shows is that she has adopted her enforcement position, not because of a belief that an unadorned percentage test measures the reasonableness of candidacy eligibility rules, but because of the fact that "any member may bring litigation against the Secretary" in the D.C. Circuit where *Doyle* was decided, 60 Fed. Reg. 26391,

and, in the words of the Seventh Circuit here, because of the resulting "perceived futility of bucking a decision by the District of Columbia Circuit," App. 5a.

To exacerbate the situation, when the Secretary *does* bring suit, the test of validity of the attendance rule in question does not (outside the District of Columbia) correspond to the test of validity that informed the Secretary's determination as to whether the suit should be brought in the first instance. Instead, the governing legal standard varies depending upon where the suit has been brought. And, because the different tests yield different results, the results will also vary depending on where the suit has been brought.

In the case of USWA local unions, if the suit is brought in the First Circuit, the multi-factor 29 C.F.R. 452.38(a) test applies, and, under that test — as the Secretary determined when the USWA's current rule was adopted, *see supra* at p. 5—the USWA rule passes muster as a reasonable rule.

If, however, the suit is brought in the Seventh Circuit, a test applies that is different in all of its particulars from the First Circuit/29 C.F.R. 452.38(a) multi-factor test. Indeed, in one of its particulars, the Seventh Circuit test treats as *fatal* to the validity of a meeting attendance rule a factor that the First Circuit/29 C.F.R. 452.38(a) test treats as weighing *in favor* of validity: *viz.*, the existence of an excuse provision.

While a provision excusing non-attendance "on a showing of job requirements or other compelling reasons" evinces a meeting attendance rule's reasonableness in the First Circuit, *see Postal Workers*, 201 F.3d at 3, in the Seventh Circuit such a provision undermines the credibility of the union's justification for the rule, on the theory that "if the meeting-attendance requirement were regarded as a vital condition of effective officership ... the fact that a member was without fault in failing to satisfy it would not excuse the failure," App. 4a. Thus, the Seventh Circuit's, test of reasonableness

is one a union meeting attendance rule can pass only if it omits an excuse provision of the kind that the Secretary long has treated as *indispensable* to a rule's reasonableness under the 29 C.F.R. 452.38(a) multi-factor test.

The upshot of all of this is an utterly incoherent § 401(e) regime that serves no discernable set of interests. That regime is the product of warring Court of Appeals decisions—with one circuit reading this Court's *Local 3489 Steelworkers* decision as requiring the Secretary to sue on a single-factor "impact" theory that she had never embraced on her own and two other circuits rejecting both that reading of *Local 3489* and the single-factor impact test as unsound. Such a regime should not continue. And only a decision of this Court can bring the current regime to a well-deserved end.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEON DAYAN
LAURENCE GOLD
(Counsel of Record)
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

CARL B. FRANKEL
General Counsel
UNITED STEELWORKERS OF AMERICA
5 Gateway Center
Pittsburgh, Pennsylvania 15222